

Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, DC 20554

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FEDERAL COMMUNICATIONS COMMISSION  
OFFICE OF SECRETARY

In the Matter of )

Unbundling of Local Exchange Carrier )  
Common Line Facilities )

RM-8614

**GTE's COMMENTS**

DOCKET FILE COPY ORIGINAL

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**GTE's COMMENTS**

GTE Service Corporation and its affiliated domestic telephone operating companies ("GTE"), with reference to the Public Notice dated March 10, 1995, Report No. 2061, submit the following comments regarding the Petition for Rulemaking of MFS Communications Company, Inc. ("MFS") (the "*MFS Petition*") filed on March 7, 1995.

**INTRODUCTION AND SUMMARY**

It was recently observed by FCC Chairman Hundt: "Bringing real competition to the local exchange will require addressing a variety of complex and intertwined issues."<sup>1</sup> GTE agrees with this sound observation. For years it has been a given that the telephone network must be open to all forms of competition. Recognizing the "complex and intertwined issues" involved, the challenge that must now be faced is creating an environment that will assure -- employing again the words of Chairman Hundt -- **real competition**.

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<sup>1</sup> Remarks of Chairman Reed E. Hundt, before the American Bar Association, Antitrust Section, April 6, 1995 at 4.

The *MFS Petition* would be a poor vehicle for attaining this objective. Its concern is with state-certified providers<sup>2</sup> seeking to compete with Local Exchange Carriers ("LECs" or "exchange carriers") in the furnishing of local exchange telecommunications services. For this purpose, MFS ostensibly seeks "unbundling", *i.e.*, the offering of the "local loop" independently of other LEC-provided services or features.

In fact, the equivalent of this "unbundled" local loop is already provided for in the tariffed private line offerings of GTE and other exchange carriers. These private lines are technically and operationally equivalent to an "unbundled" local dialtone loop. And efficient network operation and network security require LEC testing and monitoring for both existing private line offerings and the "unbundled" local dialtone loop sought by MFS. The reality -- that the equivalent of "unbundling the local loop" has already been accomplished -- invalidates MFS' claims that LECs are employing "essential facilities" to maintain an unlawful "tying arrangement."

The real objective of MFS is to pay a lower price for what is already available. The equivalent of the "unbundled" local loop MFS seeks is offered at rates that have met all the requirements established by the FCC for interstate special access and by state commissions for local/intraLATA private line. MFS does not even suggest that these rates are in any way unreasonable.

What constrains MFS in seeking to compete with local dialtone service offered by exchange carriers is that the price of that LEC service is maintained at an artificially low level by mandate of state regulatory agencies. Arbitrary action manipulating LEC

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<sup>2</sup> The *MFS Petition* (at i, Summary) addresses only matters affecting "state-certified competing providers."

prices to serve MFS' purposes will not deal with that real underlying problem, which is part of the complex and intertwined issues referred to by the FCC Chairman.

Furthermore, the "essential facilities" argument of the *MFS Petition* fails because it does not show that it is infeasible to create alternative facilities essential to MFS' business of providing service to the most profitable portions of the market. Today, a wide variety of sophisticated providers are investing billions of dollars in building infrastructure to compete with LECs. While preferring to limit its investment in facilities, MFS does not show that a viable and thriving business challenging LECs in their primary markets cannot be created by the market entrant's own facilities focused on selected customer sets. Indeed, such a claim would clash with MFS' own position before state commissions and the capital markets. Opposed to MFS' rhetoric claiming this is infeasible is the solid fact of heavy financial commitments of many sophisticated investors who are already carrying out what MFS says cannot be done.

MFS' "essential facilities" argument, if it were valid (it is not), would prove far too much. It would prove that the furnishing of local telephone service is, after all, a natural monopoly. But the "natural monopoly" concept has been put aside by all parties: LECs, Interexchange Carriers ("IXCs"), Competitive Access Providers ("CAPs"), federal/state regulators, federal/state legislators, the courts, and the capital markets.

The issue is not whether there will be competition at the local exchange level but whether it will be real competition -- which means active and aggressive competition on every level involving all qualified parties. If exchange carriers are not permitted to compete on an equal basis, there will not be real competition. Further, as recently stressed by the Department of Justice, real competition should mean where feasible

two or more wires would connect businesses and homes to the "Information Superhighway."

Apart from these deficiencies, the *MFS Petition* is a poor vehicle for Commission inquiry because, rather than the broad focus indicated by the Chairman's words, its focus is very narrow and self-serving. GTE and other LECs have stressed the urgent need for a broad examination of the interrelated problems involved in balancing competition with the continuing insistence of many regulators/legislators on a "Carrier of Last Resort" ("COLR") concept that places heavy burdens on one class of competitors, exchange carriers. MFS insists it should be able to purchase "unbundled" dialtone local loops not at the compensatory rate the Commission has already established for special access, but at a rate determined by subdividing the current local service rate. MFS thereby proposes, in effect, to make itself a recipient of the support inherent in today's local rates -- support largely derived from LEC services (such as access) with which MFS competes.<sup>3</sup> Such a self-serving proposal is not a suitable vehicle for resolving the inconsistencies in today's pricing structure.

The challenge facing the Commission, as well as state regulators, is to minimize the distortions to the development of competition created by traditional policies toward

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<sup>3</sup> Many parties commenting in the response to the Commission's Notice of Inquiry on universal service funding generally agreed that the Universal Service Fund ("USF") and other explicit mechanisms account for only a small proportion of universal service funding. See, for example, Amendment of Part 36 of the Commission's Rules and Establishment of a Joint Board, CC Docket No. 80-286 ("*D. 80-286*"), Sprint at 1-2, SWBT at 11. Most of the support for local service today is generated by the LECs themselves through their rates for other services. Competition for these services -- such as interstate access -- is already making this system unsustainable.



the pricing of local services, and by the resulting effects on other LEC services which provide implicit support. Fortunately, there are opportunities for the Commission to address this challenge.

The Commission can correct the distortions caused by the current method for recovering the portion of local service costs allocated to the interstate jurisdiction. This could be done by eliminating the usage-based Carrier Common Line ("CCL") charge, and replacing it with full recovery through a system of flat-rated end user charges.

Secondly, the Commission can work cooperatively with state regulators through the Joint Board process to address the problems caused by the current pricing of the intrastate portion of local service. This can be done by developing a new and comprehensive national policy toward universal service. GTE set forth a proposal for such a policy in its submissions in CC Docket No. 80-286.<sup>4</sup>

The GTE proposal would address the market intervention inherent in local rate regulation today. Where continued intervention is necessary to meet universal service goals, it would be funded through an explicit mechanism that would be competitively neutral. Support would be available on an equal basis to any carrier that undertakes the COLR obligation to provide ubiquitous local service at a controlled rate. Universal service funding would be used to reduce rates for services that provide support today, thereby reducing the level of implicit support.<sup>5</sup>

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<sup>4</sup> D. 80-286, GTE's Comments, October 28, 1994, and GTE's Reply Comments, December 2, 1994.

<sup>5</sup> Note that GTE's proposal for common line recovery is consistent with this universal service proposal. Under GTE's proposal, any end user charges would be included in the local rate used for universal service calculations. Thus, an increase in end user charges would reduce the need for universal service funding.

Within the context of this new universal service policy, there is no reason why local service cannot be resold. Indeed, GTE has specifically suggested that local carriers should be able to buy and sell services among themselves, and has proposed that carriers should be able to meet COLR obligations through the use of resold services. This will be made possible not by an FCC requirement to create an "unbundled" dialtone loop service equivalent to what already exists but by the establishment of a consistent approach toward local service pricing and support.<sup>6</sup>

While the Commission can, and should, work cooperatively with the states to develop a national universal service policy, it should also proceed with reform of interstate access regulation on its own merits. MFS suggests (at 48-50) that LECs should be granted flexibility in interstate access pricing when states have taken the actions proposed by MFS. GTE has shown in its comments on price cap review<sup>7</sup> that the market for interstate access is separate and distinct from that for local dialtone service. The Commission, which is charged with responsibility for regulating interstate access markets, should adopt reforms that will allow these markets to function more effectively and generate benefits for access customers. Such action should not be conditional on developments in other markets, or actions by other regulators. The

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<sup>6</sup> As GTE proposed in its *D. 80-286* reply comments, this resale can be sustainable even if the local rate continues to be supported. The state commission can either (i) permit resale at a market rate, while providing support to the reseller; or (ii) require resale at the supported rate, in which case support should be provided to the underlying carrier. See GTE's Reply Comments, *D. 80-286*, at 41-43.

<sup>7</sup> *Price Cap Performance Review for Local Exchange Carriers*, CC Docket No. 94-1 ("D. 94-1").

recently announced further notice in *D. 94-1* should provide an opportunity to consider appropriate reforms of interstate access regulation.

GTE's recommended approach would offer important advantages in terms of jurisdictional controversies. The *MFS Petition* would have the Commission take action at the edge of its jurisdiction. While MFS couches its recommendations in terms of "voluntary guidelines," it stresses the preemptive power of the FCC and would have the FCC take on responsibilities regarding local service and the local loop, and related revenue requirements, that have always been within the exclusive province of the state commissions. Careful draftsmanship cannot obscure the reality of what MFS is seeking. Experience suggests this would be likely to precipitate extensive and complex jurisdictional controversies that would ultimately have to be resolved by the federal courts.

All this would be in aid of a set of proposals that do not address the underlying problems but merely put forth a narrow program designed to serve the interests of MFS. In contrast, GTE's recommendations recognize and respect the power of the states. GTE calls for an innovative approach via a Federal-State Joint Board that would develop a broad cooperative policy under which sovereign power would be properly exercised by respective federal and state agencies each in its own domain. This approach would accommodate legitimate concerns of market entrants as well as established carriers, and it would make possible at all levels of telecommunications an environment of genuine competition.

## DISCUSSION

### **I. MFS' ARGUMENTS BASED ON ANTI-TRUST THEORY ARE WITHOUT MERIT.**

MFS (at 6-12) claims that the local loop represents the "quintessential telecommunications bottleneck facility" because there are no other alternatives that would enable MFS to provide service to end users. Based on this premise, MFS (at 17 and n. 17) goes on to claim that LEC "refusal to unbundle the loop from the other elements of local exchange services" can be equated to a "*per se* unlawful tie-in" under antitrust law, so that the FCC should require "unbundling" of the "local loop" to "prevent antitrust violations."<sup>8</sup>

As shown *infra*, the equivalent of an "unbundled" dialtone local loop is already being offered in the form of tariffed private line service. Putting that aside for the moment, let us examine MFS' "bottleneck" claim -- which is the keystone of their entire submission.

#### **A. MFS fails to meet the requirements of the "essential facilities" doctrine.**

MFS (at 6-12) argues that competitors cannot economically construct their own local loop facilities or employ other technologies to provide local service to residential and business customers. Notwithstanding the revolutionary developments that have occurred over the last dozen years in telecommunications technology, in regulation, in

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<sup>8</sup> MFS *Petition's* flat statement of the law on tying arrangements ignores all subtleties, as well as the concerns that led the Third Circuit to say "that the law of tying is becoming a kind of semantic shell game, resting more on key words than on careful analysis." *Ungar v. Dunkin' Donuts of America*, 531 F. 2d 1211, 1222 (3d Cir.), *cert. denied*, 429 U.S. 823 (1976). See Areeda, Phillip, and Hovenkamp, Herbert, *ANTITRUST LAW* ["*Areeda-Hovenkamp*"] ¶ 1701.

institutional structure – including the rise of such entities as MFS – MFS (at 23) cites a Seventh Circuit case from 1983 as if it described the present world. While the rulings of *1983 MCI* are today good law, the factual premises assumed by Judge Cudahy's decision have been superseded.<sup>9</sup>

MFS' "bottleneck" claim is in 1995 plainly invalid, as indicated by facts presented *infra* and positions taken by MFS itself in state regulatory proceedings. Indeed, if MFS' argument that the local network cannot economically be duplicated were valid (it is not), this would prove far too much. It would show that local distribution is a natural monopoly after all, and therefore competition should not be introduced. The behavior of all the actors – GTE and other LECs, MFS and other CAPs, the FCC, the courts, the IXCs, state legislators, state commissions, the capital markets – denies the validity of any such proposition. This shows again that the *MFS Petition* does not state a factual predicate that supports its legal arguments.

MFS (at 17-26) attempts to portray the LEC local loop as an "essential facility" that must be made available to MFS to avoid violation of antitrust principles. But MFS mis-applies the applicable legal principles. There is no general duty on the part of an

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<sup>9</sup> *MCI Comm. Corp. v. American Tel & Tel. Co.*, 708 F. 2d 1081, 1133 (7th Cir.), *cert. denied* 464 U.S. 891 (1983) ("*1983 MCI*"). Judge Cudahy's opinion for the Seventh Circuit was careful to qualify its "natural monopoly" statement in terms of technology existing at that time ("Given present technology....") and phrased it as a statement of conventional wisdom ("is generally regarded") as of 1983: "Given present technology, local telephone service is generally regarded as a natural monopoly and is regulated as such. It would not be economically feasible for MCI to duplicate Bell's local distribution facilities (involving millions of miles of cable and line to individual homes and businesses), and regulatory authorization could not be obtained for such an uneconomical duplication." As shown *infra*, the capital markets are today investing billions of dollars in the "uneconomical duplication" of "cable and line to individual homes and businesses."

owner of facilities to share those facilities with other parties, much less competitors.<sup>10</sup> It is only under certain defined circumstances that a legal obligation arises. "The core concern [of the antitrust laws] is that a monopolist possesses a resource that he denies to certain persons for whom it is 'essential' in some sense."<sup>11</sup>

The most widely cited test for establishing an antitrust claim based on an essential facilities theory is found in the very case cited by MFS, *1983 MCI*, where the court identified four elements to such a claim:

1. control of the essential facility by a monopolist;
2. a competitor's inability practically or reasonably to duplicate the essential facility;
3. the denial of the use of the facility to a competitor; and
4. the feasibility of providing the facility.<sup>12</sup>

MFS has not presented facts that meet any of these four *1983 MCI* prongs. As to the first and second prongs, the LECs' loop and switching facilities are not an "essential facility" because they can be reasonably duplicated -- and are being duplicated today -- by a wide variety of providers that are investing and putting at risk billions of dollars in building infrastructure. As to the third and fourth prongs, the *MFS Petition* itself recognizes that LECs have not denied MFS use of their facilities.

As testified by MFS' own witnesses before state commissions,<sup>13</sup> exchange carriers offer under tariff as unconditioned private lines facilities that are functionally

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<sup>10</sup> *Areeda-Hovenkamp* ¶ 736.1 (supp. 1993).

<sup>11</sup> *Id.*

<sup>12</sup> 708 F.2d at 1132-33.

and technically equivalent to "unbundled" local dialtone service loops MFS is here demanding. MFS does not even attempt to show any denial of interconnection, much less attempt to show any violation of the very precise rules on interconnection adopted by the FCC.<sup>14</sup>

Thus, there is no resemblance whatever to such "essential facilities" cases as *1983 MCI* or *Otter Tail Power Co. v. United States*.<sup>15</sup> What MFS is seeking here, *i.e.*, regulatory action setting lower prices, falls outside the scope of these cases and their guiding principles.

**In summary:** MFS meets none of the "essential facilities" tests of *1983 MCI*, and thus fails to establish a case for antitrust violation by exchange carriers.

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<sup>13</sup> MFS itself recognizes that there is no technical difference between a local loop and a unconditioned private line. *See, for example, MFS Intelenet of Pennsylvania, Inc.*, Docket No. A310203F0002, Rebuttal testimony of Gary J. Ball at 34: "Viewed from the perspective of the physical facilities used, there is not much difference at all."

<sup>14</sup> *See The Need to Promote Competition and Efficient Use of Spectrum for Radio Common Carrier Services*, Report No. CL-379, Declaratory Ruling, 2 FCC Rcd 2910 (1987), *reconsideration*, 4 FCC Rcd 2369 (1989); *Expanded Interconnection with Local Telephone Company Facilities*, CC Docket No. 91-141, Report and Order and Notice of Proposed Rulemaking, 7 FCC Rcd 7369 (1992) ("*D.91-141 Report and Order*"), *denial of stay*, 8 FCC Rcd 123 (1992), *modified on reconsideration*, 8 FCC Rcd 127 (1992), *modified on further reconsideration*, Second Memorandum Opinion and Order on Reconsideration, 8 FCC Rcd 7341 (1993), *reversed in part and remanded*, *Bell Atlantic Telephone Companies v. FCC*, 24 F.3d 1441 (D.C. Cir. 1994), *decision on further reconsideration and remand*, Memorandum Opinion and Order, 9 FCC Rcd 5154 (1994), *petition for review filed sub nom. Pacific Bell v. FCC*, Nos. 94-1547 and 94-1548 (D.C. Cir. August 10, 1994).

<sup>15</sup> 410 U.S. 366, 377-379 (1973)

**B. To create a successful business competing with LEC dialtone services, MFS need not duplicate the entire local exchange network.**

In approaching the question of whether creation of an alternative network is feasible, this must be recognized at the outset: the core of the approach to the marketplace of MFS and similar firms is freedom to choose which parts of the market they wish to serve. MFS has gone on record saying it does not intend to be a ubiquitous service provider, that its business mission is to serve the small and middle-sized business customer.<sup>16</sup> In speaking to the states, MFS makes it clear its business plans are focused on (i) serving the locations that can be served at low cost relative to traffic density and (ii) serving the most profitable markets.<sup>17</sup>

This limitation of scope clearly relates to the dimensions of any construction effort MFS might choose to carry out. While it is shown *infra* that the LEC network could be duplicated, MFS would not have to duplicate the entire LEC network to create a thriving enterprise that challenges LECs in all the prime markets.<sup>18</sup> To come within "essential facilities," the facility being denied must be not just helpful but essential.

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<sup>16</sup> Illinois Commerce Commission, Docket No. 93-0409, Direct Testimony of Alex J. Harris at 5-6; MFS Intelenet of Pennsylvania, Inc., Docket No. A310203F0002, Direct Testimony of Susan De Florio at 9, Further Rebuttal Testimony of Gary J. Ball at 5; MFS of Intelenet of Oregon, Inc., Docket No. CP1, CP14, CP15, Direct Testimony of Alex J. Harris at 10.

<sup>17</sup> In Pennsylvania, MFS has stated that it only intends to serve the business community and will equip its network only with voice-grade telephonic services. MFS Intelenet of Pennsylvania, Inc., Docket No. A-310203F0002, Bell Data Request at 31 (October 26, 1994).

<sup>18</sup> A very small percentage of customer locations generate a very large percentage of switched traffic. For example, in Santa Monica, California, more than 75 percent of GTE's interstate access demand comes from only 1.5 percent of all end user locations. See *Ex Parte* letter dated March 10, 1995, from Geoffrey C. Gould, Vice President, Government & Federal Regulatory Affairs, to Reed E. Hundt, D. 94-1, at 2.



The *MFS Petition* merely shows that MFS does not wish to undertake the financial burdens and risks involved in extending its own network even to reach its targeted market. Risk aversion and selective deployment of capital may be rational and proper conduct for a firm seeking to meet its net income objectives and produce maximum value to its shareholders. But it is not the purpose of the antitrust laws, nor should it be the goal of this Commission, to facilitate MFS' wish to avoid financial commitments. This point is reinforced by the expressed willingness of other qualified parties to undertake such financial commitments. And it is not just empty talk. As shown *infra*, many parties are actively engaged in making huge investments in the creation of infrastructure that duplicates the LEC network.

**In summary:** No denial of essential facilities is created merely because MFS' business strategy is designed to combine avoiding investment in the telecommunications infrastructure while obtaining lower prices for use of LEC facilities.

**C. MFS fails to show that the facilities required to provide service cannot feasibly be created.**

**1. The realities of the marketplace deny MFS' claim that construction of an alternate network is infeasible.**

A comprehensive study of the status of competition for telecommunications services issued almost two years ago concluded that the idea of "a well-defined, economically impregnable 'local bottleneck' is ludicrous."<sup>19</sup> Recent history and actual marketplace activity prove this to be an accurate assessment.<sup>20</sup> Publications oriented

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<sup>19</sup> See, Peter W. Huber, Michael K. Kellogg, and John Thorne, *The Geodesic Network II: 1993 Report on Competition in the Telephone Industry*, at 2.3.

<sup>20</sup> GTE has documented extensive competitive activity in GTE service areas involving not only CAPs, but also cable television firms and electric power companies. See D. 94-1, GTE's Comments, May 9, 1994, at 29-37 and Attachment C.

to the telecommunications industry report continually on entry into new markets by well financed existing firms<sup>21</sup>, or on new mergers or joint ventures designed to capture customers currently served by exchange carriers.

Actual behavior is a more significant indicator of marketplace reality than the self-serving language of pleadings. CAPs -- including MFS -- have initiated operations in hundreds of cities.<sup>22</sup> The president of one large CAP characterized the market opportunities available to his firm as being "just a candy store out there for the kids."<sup>23</sup> The same executive predicted that CAP industry revenues of "\$12 billion to \$15 billion should be a slam dunk in this decade."<sup>24</sup> On March 31, 1995, MFS announced that it will be accelerating its growth plans in response to favorable regulatory, legislative and competitive changes. To carry out this plan, MFS' announced intent is to file a \$250 million shelf registration during the second quarter of 1995. Proceeds from the sale will

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<sup>21</sup> See, for example, "MCI Metro deploys switches for local fight," *Telephony*, March 13, 1995, at 9, describing MCI Metro's intent to install digital switches to allow it "to offer full local service to business customers in a few cities before the end of 1995." The article also quotes an industry analyst that warns that despite the lack of interconnection agreements, "all carriers on the local front have reason to take MCI Metro seriously."

<sup>22</sup> For a comprehensive listing of competitors for access and exchange services, including the technologies employed and the cities in which they are located, see Comments of the United States Telephone Association, *D. 94-1*, May 9, 1994, at Appendix B.

<sup>23</sup> See remarks of Wallace Griffin, President of Jones Lightwave, Inc, "ALTS Members Claim Public Policy 'Victory,' Make Case for Growth Beyond Confines of 'CAP' Label," *Telecommunications Reports*, November 7, 1994, at 5.

<sup>24</sup> *Id.*

be used to expand service to end user customers in Europe and the United States through expansion of "facilities-based services."<sup>25</sup>

Similar views have been expressed by leading cable television giants planning to offer telephony over cable networks -- and explicitly in terms of creating an alternate network of facilities. Recently, the *Wall Street Journal* quoted Glenn A. Britt, President of Time Warner Cable Ventures. Speaking of deploying central office switches to create a phone system after his company's fiber upgrade program of the cable network is completed, Mr. Britt said, "I don't see the technology as particularly challenging."<sup>26</sup> Time Warner estimates that it can break even in the local exchange business using its current plans and existing technology after obtaining only five percent of the homes that are within the range of its cable facilities.<sup>27</sup> Time Warner considers the capital cost of this endeavor, estimated at five billion dollars, justified by the opportunity to compete for a part of the \$90 billion-a-year local telecommunications market.<sup>28</sup>

Contrary to MFS' argumentation (at 7-8), it is not technically difficult for a cable television system to introduce switching capabilities and interoffice transmission facilities. A study by the Commission's own staff has indicated that a cable system can

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<sup>25</sup> "MFS ANNOUNCES FURTHER ACCELERATION IN GROWTH PLANS [,] COMPANY PLANS TO RAISE ADDITIONAL CAPITAL [,] MFS AND KIEWIT ANNOUNCE POTENTIAL OWNERSHIP DISTRIBUTION," Individual, Inc., *PRNewswire via First!*, March 31 1995, at 3-9. The chief executive officer of MFS is quoted as saying: "Co-carrier status is becoming a reality much faster than we envisioned even one year ago." *Id.* at 4.

<sup>26</sup> *The Wall Street Journal*, March 20, 1995, at R9.

<sup>27</sup> *Id.*

<sup>28</sup> *Id.*

be upgraded to provide telephony at a reasonable cost -- estimated at \$207 per line.<sup>29</sup> Employing a recently introduced telephony-over-cable system specifically designed for the purpose, Time Warner will offer telephone service to its 200,000 subscribers in Rochester, N.Y.<sup>30</sup> Many non-LEC telecommunications service providers have formed partnerships with cable television firms with the aim of providing local telephone services.<sup>31</sup> Tele-Communications, Inc. ("TCI") has stated its intent to "plunge headlong into the telephone business by outfitting all of its cable systems to carry residential telephone traffic by the year 1996...."<sup>32</sup>

The foregoing information is consistent with GTE's research on whether a cable company can provide both voice and video services over a hybrid fiber coax network. GTE's research shows that cable companies are opting to provide voice grade

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<sup>29</sup> See, David P. Reed, Office of Plans and Policy, Federal Communications Commission, "The Prospects for Competition in the Subscriber Loop: The Fiber-to-the-Neighborhood Approach," Presented at the Twenty-First Annual Telecommunications Research Policy conference, Solomon Island, MD, September 1993.

<sup>30</sup> This system, the CABLESPAN system from Tellabs Operations, Inc., is described by the manufacturer as "a seamless upgrade to the existing cable TV network that allows Time Warner to provide telephone service over the same fiber optic and coaxial cables used to deliver cable TV. This system ... is compatible with cable systems used around the world. Low start-up cost, the capability to provision a wide variety of services from a single platform and scalable growth are hallmarks" of the system. "TIME WARNER AND TELLABS DELIVER CABLE TELEPHONY," COMTEX, February 28, 1995.

<sup>31</sup> See, for example, "Teleport Expands St. Louis-Area Network," *Telecommunications Reports*, March 20, 1995, at 16, discussing various joint ventures among Teleport and Tele-Communications, Inc., Continental Cablevision, United Video Cablevision, Inc., and Charter Communications Group.

<sup>32</sup> Neel, K.C., "TCI, Bell Atlantic: On to Plan B," *Cable World*, Vol. 6, No. 10, March 7, 1994, at 1.

communications by pursuing an architecture that builds on the existing cable infrastructure. This allows the deployment of fiber in the core network with coaxial distribution facilities to the end user. A use of technology that does not obsolete the existing cable video infrastructure, it should furnish a very economical vehicle for entering the voice grade telecommunications market without constructing a completely new network.

Showing that these statements have real substance, Time Warner is seeking authority on a state-by-state basis to engage in the local telephone service business. If MFS is unwilling to make the heavy investment required to create an alternate network, there are others with excellent access to the capital markets that are willing to make these investments.

This is further supported by looking at actual investment in radio facilities. MFS claims (at 6-7) that wireless and cable television system technologies cannot be used to compete effectively with a wireline network. This pronouncement certainly will be unsettling news to firms that already use or plan to use those technologies to compete for local exchange service.

For example, after paying a total of \$2.11 billion for Personal Communications Services spectrum in 29 markets, a partnership comprised of such sophisticated firms as Sprint, TCI, Cox Enterprises, Inc., and Comcast Corporation has stated its intent to use the spectrum to help "'turn cable into local phone service' and offer about 180 million potential customers one-stop shopping for telephone and video services."<sup>33</sup>

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<sup>33</sup> "Wireless Sale Winners Include AT&T, Sprint," *The Wall Street Journal*, March 14, 1995, at A3, quoting Gary Forsee, interim chief executive officer of the Sprint-cable group.

MFS' claim of infeasibility is invalidated by the dimensions of the partnership's financial commitment (\$2.11 billion) together with the just-cited figure of 180 million customers. This partnership of sophisticated firms is moving ahead to to what MFS insists cannot be done.

And the partnership is not alone. The last round of the PCS auction has been reported to bring in \$7.7 billion.<sup>34</sup> As firms commit these large sums to the wireless market, equipment vendors are driven to develop new products. Announcements of new wireless technology developments aimed at performing the same function as the LEC dialtone local loop frequently appear in the media.<sup>35</sup>

The opportunities for using wireless technology to compete for local service is not merely in the planning stages. In Hawaii, CyberTel Cellular, a subsidiary of Ameritech, is currently using its cellular network to offer an alternative to local telecommunications services as indicated by its advertisements leading with the statement that its prices are "competitive with [the] local GTE HawTel charges." CyberTel's rates are among the lowest in the United States with customers receiving usage rates for as little as 3.7 cents per minute.

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<sup>34</sup> "Broadband PCS auction nets \$7.7 billion; AT&T, Sprint, RHCs win 70 licenses," *Telecommunications Reports*, March 20, 1995, at 3-6.

<sup>35</sup> See, for example, "WinStar eyes local loop bypass, PCS markets," *Telephony*, March 6, 1995, at 28, discussing a newly developed 38-Ghz radio system that uses "small, easy-to-install radio antennas" and provides a "transmission path of four channels with 100 to 400 MHz of capacity in each channel, or enough for four T-1s per channel." In four months, WinStar plans to upgrade the service "to handle eight T-1s or one T-3 per channel." By the end of 1995, WinStar plans for the service to "support SONET speeds of OC-3 and beyond." The range of the service is "about five miles."

A telling example of what can be done when an entity deploys the capital to build infrastructure is the network developed by the town of Glasgow, Kentucky, which is within the service territory of GTE South Incorporated. The municipal Plant Electric Board has constructed a broadband network that provides cable television, local telephone service and high-speed data services to many of the towns 14,000 residents. Glasgow residents enjoy some of the lowest cable television rates in the country at \$12.00 per month. MFS has selected this municipality to test a low-cost, high-speed access service based on a 2-Mbps broadband network to provide more efficient access to the Internet.<sup>36</sup>

Finally, a most significant voice asserting that creation and maintenance of dual local networks is viable today is that of the United States Department of Justice. Assistant Attorney General Anne Bingaman says the proper method of local competition is "two-wire" competition, which by necessity requires that some entity or group of entities replicate the existing local exchange facilities. Describing "[t]wo-wire competition" as "critical," the Justice Department maintains:

The whole premise of competition is that there be somebody to compete with. If you have one wire and one person, one company, one entity, controlling that wire, with the ability to slow down access to it, to play games with pricing - whatever - what you could be buying into is just a lot of antitrust litigation.

If you have multiple competitors in a market, they take care of the market themselves. You don't need regulation and you don't need antitrust suits.<sup>37</sup>

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<sup>36</sup> Wilder, Clinton, "Testing Internet Access....", Individual, Inc., *Information Week via First!*, March 2, 1995.

<sup>37</sup> *The Wall Street Journal*, March 20, 1995, at R17.

**In summary:** MFS' claim that it is infeasible to construct an alternate network is denied by the reality of the marketplace.

**2. MFS' own statements show that the "essential facilities" doctrine is not involved here.**

In contrast with the confident assertions of many parties quoted *supra*, in contrast with the actions of many parties willing to commit billions of dollars, cited *supra*, MFS whimpers (at 4-12) that what is being done by others on a massive scale cannot be done. MFS insists it cannot duplicate the local exchange network, it cannot obtain from other suppliers an adequate substitute, it cannot create an adequate substitute by employing alternate technologies. Cited as reasons are cost, technology and differences between itself and exchange carriers.

As shown *supra*, all of the foregoing rationales are without merit. Further, this MFS position is at odds with statements the company's representatives have made in various regulatory proceedings across the United States.<sup>38</sup>

In Texas, MFS has stated that it can provide local exchange service to residential and small business end users by constructing its own facilities if it so desires.<sup>39</sup> However, MFS will construct its own facilities only if it has no other options for reaching customers. Far from saying it cannot be done, or even that MFS cannot do it, MFS' testimony is that it does not wish to do so. Indeed, since MFS says it has no current plans to construct facilities, it cannot describe the conditions under which it

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<sup>38</sup> See, for example, MFS Intelenet of Pennsylvania, Inc., Docket No. A-310203F0002, Bell Data Request at 3.53 and 3.54 (January 17, 1995).

<sup>39</sup> MFS Intelenet, Inc, Docket No. 13282, Office of Public Utility Counsel Data Request at 3-16 (January 24, 1995).



would do so.<sup>40</sup> Further, MFS has suggested to Texas regulators that -- while this is not its preferred approach -- MFS can utilize cable television facilities for all or part of a connection to end user locations.<sup>41</sup> In order to provide service to the Texas end user, MFS stated it would lease facilities from cable television systems, CAPs, private networks and utilities. MFS went on to tell the Texas regulators it could not be more specific given the fact that it "has not determined" how it will serve particular end users.<sup>42</sup> This is a far cry from what MFS is telling the FCC.

In Pennsylvania, MFS claims that only those entities with extensive facilities in place, such as cable television and electric utilities, would be able to provide facilities-based service to most areas of the Commonwealth in competition with exchange carriers.<sup>43</sup> While the marketplace challenges this claim of MFS, as shown *supra*, MFS' own testimony recognizes that a number of entities are capable of competing with LECs in furnishing local exchange service.

Perhaps most telling is MFS' admission in Pennsylvania<sup>44</sup> that it does not know the prospective cost of local loop construction, never having prepared a study or

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<sup>40</sup> MFS Intelenet, Inc, Docket No. 13282, Office of Public Utility Counsel Data Request at 3-16 (January 24, 1995).

<sup>41</sup> MFS Intelenet, Inc, Docket No. 13282, Office of Public Utility Counsel Data Request at 3-18 (January 24, 1995).

<sup>42</sup> MFS Intelenet, Inc, Docket No. 13282, Office of Public Utility Counsel Data Request at 3-17 (February 2, 1995).

<sup>43</sup> MFS Intelenet of Pennsylvania, Inc., Docket No. A-310203F0002, Direct Testimony of Gary J. Ball at 54-55 (November 28, 1994).

<sup>44</sup> MFS Intelenet of Pennsylvania, Inc., Docket No. A-310203F0002, Office of Consumer Advocate Data Request at 13 and 14 (October 26, 1994).